



Indiana Brownfields Program  
100 North Senate Avenue, Room 1275 • Indianapolis, IN 46204  
[www.brownfields.in.gov](http://www.brownfields.in.gov)

## Federal Brownfields Tax Incentive Section 198(a) Internal Revenue Code

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### Introduction

Section 318 of the Emergency Economic Stabilization Act of 2008<sup>1</sup> provided an extension of the Federal Brownfields Tax Incentive which allows a taxpayer to fully deduct the costs of environmental cleanups in the same year they are incurred (rather than spreading them over a period of years). The 2008 extension of the tax incentive will allow remediation expenses that have been or will be paid or incurred through December 31, 2009 to be claimed as deductible business expenses if certain land use and contamination requirements are met. Improvements in 2006 expanded the tax incentive to include petroleum cleanup.

The Indiana Department of Environmental Management (IDEM)<sup>2</sup> will provide the Property Eligibility Statement required by Section 198(c)(3) of the Internal Revenue Code (IRC)<sup>3</sup> to qualifying taxpayers making a request to the Indiana Brownfields Program (Program) and submitting the required documentation discussed below. The Property Eligibility Statement, which confirms there has been a release or threat of release or disposal of a hazardous substance at a property, must be obtained by the taxpayer *before* the taxpayer can claim the deduction. However, the Program expects taxpayers to rely upon tax counsel for clarification of any issues related to the tax incentive, in particular whether a given expenditure incurred by the taxpayer is an eligible remediation expenditure.<sup>4</sup> IDEM does not determine whether a given expenditure is eligible. Property eligibility statements are valid for the applicable life of the tax incentive (currently scheduled to sunset December 31, 2009).

### Background Information

The Federal Brownfields Tax Incentive was originally signed into law as part of the Taxpayer Relief Act of August 1997, and codified through Section 198(a) of the IRC.

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<sup>1</sup> Public Law No. 110-343 (H.R. 1424).

<sup>2</sup> As established by a September 28, 1997 letter issued by Governor Frank O'Bannon, IDEM is responsible for determining whether an entity has a qualified contaminated site under the federal Internal Revenue Code. See 26 U.S.C. § 198(c)(3), (4).

<sup>3</sup> 26 U.S.C. § 198.

<sup>4</sup> Types of eligible expenses include certain site assessment and investigation activities; site monitoring; cleanup costs; operation and maintenance costs; state voluntary cleanup program oversight fees; and removal of demolition debris.

The intent of the tax incentive is to spur the cleanup and revitalization of brownfield properties by allowing certain environmental cleanup costs to be fully deducted by eligible taxpayers in the year in which they are incurred, rather than having to be capitalized and spread over a period of years.<sup>5</sup>

The Federal Brownfields Tax Incentive is not a tax credit, but reduces a taxpayer's tax burden by lowering taxable income. The incentive does this by allowing eligible remediation costs to be fully deducted in the year the costs were incurred (called "expensing"), rather than spreading the costs over a period of years ("capitalizing"). Companies prefer these "accelerated deductions" because they can substantially reduce their current income, allowing tax savings to be recaptured now rather than later. In accordance with Internal Revenue Service guidance, previously filed tax returns can be amended to include deductions for past cleanup expenditures. Taxpayers that cause contamination and remediate a property are eligible to expense the costs *if* they are changing the use of the property.

### Qualified Contaminated Site

A specific property is a "qualified contaminated site" under Section 198(c) if the following requirements are met:

Land Use: The property must be "held by the taxpayer." This definition includes outright ownership; however, some types of long-term lease arrangements may qualify. If there is a question whether the property is "held by the taxpayer," taxpayers should consult with their tax counsel to determine whether their circumstances qualify. In addition, the taxpayer must hold the property for trade or business or income generation purposes. This may include trade or business property, investment property, or property held as inventory. This does not include personal use property or property for which the reuse will be park or open space.

Contamination: In general, a property is eligible for the tax incentive if it is an area at or on which there has been: 1) a release or threat of release of a hazardous substance (including petroleum products); 2) disposal of a hazardous substance (including petroleum products).<sup>6</sup> The property is not eligible if it is listed on, or proposed for, the national priorities list under section 105(a)(8)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act. IDEM can declare a site eligible before any

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<sup>5</sup> The original tax incentive was active from August 5, 1997 until it expired on December 31, 2005. On December 20, 2006, the tax incentive was reactivated and applied retroactively to expenses incurred after December 31, 2005, as well as to costs incurred through the new December 31, 2007 expiration date. As a result of the 2008 tax incentive extension, eligible expenses incurred after December 31, 2007 can be deducted. However, the 2008 extension will expire on December 31, 2009; therefore, only expenses incurred to that date will be deductible, unless the incentive is again extended.

<sup>6</sup> In December 2006, changes to provisions of the tax incentive were made to allow the deduction of expenses for the cleanup of petroleum products (e.g., crude oil, crude oil condensates, and natural gasoline). Tax Relief and Health Care Act of 2006, P.L. 109-432 (Division A, title I, § 109) (enacted December 20, 2006).

work has been done by the taxpayer on abatement or control of contamination and is not responsible to determine whether or not any abatement or control activities have taken or will take place.

#### **Affidavit and Documentation Requirement**

In order to obtain a statement from IDEM regarding the eligibility of a site, the taxpayer must complete an “Affidavit in Support of Designation as a Qualified Contaminated Site.” *See attached example.* Please submit the fully executed Affidavit to the attention of Michele Oertel, Indiana Brownfields Program, 100 N. Senate Ave., Room 1275, Indianapolis, IN, 46204 or by email to: [moertel@ifa.in.gov](mailto:moertel@ifa.in.gov), with a cover letter indicating that you are seeking a Federal Brownfields Tax Incentive Property Eligibility Statement and the following information: 1) address of the property; 2) name of the taxpayer submitting the request and its mailing address; and, 3) name and contact information for the individual submitting the request.

If the site is already in an IDEM remediation program, please include the assigned program site number in your cover letter. Please also provide the following documentation with the Affidavit and cover letter, if available: 1) a Phase I/II investigation report; 2) photographs; or, 3) other evidence of a release or threat of release of a hazardous or petroleum substance at the site.

#### **Questions/For More Information**

Please direct any questions regarding the process to obtain a Federal Brownfield Tax Incentive Property Eligibility Statement to Michele Oertel of the Indiana Brownfields, Program at (317) 234-0235 or [moertel@ifa.in.gov](mailto:moertel@ifa.in.gov). Information from the United States Environmental Protection Agency regarding the tax incentive can be found at: <http://www.epa.gov/brownfields/bftaxinc.htm>. To find out more about the Indiana Brownfields Program including available financial incentives for site assessment and remediation activities, visit [www.brownfields.in.gov](http://www.brownfields.in.gov).

## AFFIDAVIT

State of Indiana                     )  
  )  
County of \_\_\_\_\_)

The purpose of this Affidavit is to set forth certain information and documentation to enable the Indiana Department of Environmental Management (IDEM) to provide a statement pursuant to 26 U.S.C. § 198(c)(3) (expensing of environmental remediation costs).

The undersigned, being first duly sworn, deposes and says as follows:

1. This Affidavit is executed by the undersigned [individual's name and title] on behalf of [taxpayer's name] located at [taxpayer's address] regarding property located at: [address of subject property].
2. The property is an area at or on which there has been a release or threat of release or disposal of a hazardous substance, as defined by sections 101(14) and 102 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), subject to the limitations in Section 104(a)(3), and/or a petroleum product (as defined in 26 U.S.C. § 4612(a)(3)). Analytical results, photographs, or other evidence of a release or threat of release has been provided to IDEM in connection with the request for a Federal Brownfield Tax Incentive Property Eligibility Statement.
3. The property is NOT a site on or proposed for the National Priority List under section 105(a)(8)(B) of CERCLA.

I swear under oath that this is a true and complete statement.

\_\_\_\_\_  
[Individual's name]  
On behalf of [insert taxpayer  
name if not the individual]

Subscribed and sworn to and before me on this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public

My Commission expires: \_\_\_\_\_